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SANITARY LEGISLATION.

COURT DECISIONS.

TENNESSEE SUPREME COURT.

Foodstuffs—Poisonous Substances—Manufacturer Held Liable to Consumer.

BOYD ET UX v. COCA-COLA BOTTLING WORKS, 177 S. W. Rep., 80. (Apr. 15, 1915.)

A manufacturer of foodstuffs which are placed on sale in sealed packages must exercise care to see that nothing unwholesome or injurious is contained in the packages, and he is liable to the consumer for injury resulting from negligence in filling a package even when the consumer purchases the package from a dealer and not directly from the manufacturer.

A bottle of coca-cola, purchased from a retail dealer, contained a cigar stub which had been placed there before the bottle was sealed in the bottling works. The wife of the purchaser was made ill by drinking part of the contents of the bottle. The court held that the bottler was liable for the injury.

GREEN, J.: This damage suit was instituted by W. C. Boyd and wife, Lou J. Boyd, and pending the suit Mrs. Boyd died. W. C. Boyd was appointed her administrator, and the case was revived.

A motion for a directed verdict in favor of defendant below was sustained by the trial court. Upon appeal this judgment was reversed by the Court of Civil Appeals, and the case is before us on petition for certiorari, which has been granted.

Mrs. Lou Boyd was a lady in delicate health who was in the habit of occasionally drinking coca-cola as a tonic and for its invigorating effects. Her husband bought for her a sealed bottle of this beverage from a retail dealer in Nashville. He carried the bottle home and poured a portion of its contents into a glass. His wife drank the liquid poured out, and immediately became intensely nauseated and suffered seriously from its effects.

Mr. Boyd examined the bottle and found therein a cigar stub about 2 inches long which had apparently been in the liquid for some time. It was shown on the trial that complaint was made by Mr. Boyd to an agent of the Coca-Cola Bottling Works about the incident referred to, and this agent expressed regret and indignation and said that the company had employed some negroes who were careless about washing bottles into which coca-cola was poured. The proof shows that it was the custom of defendant company to buy empty bottles around town and refill them. A physician testified for plaintiff below as to the poisonous effect of a fluid impregnated with nicotine from a cigar stub.

Defendant below introduced no proof, but made a motion for peremptory instructions, which was sustained on the ground that there was no privity of contract between the Boyds and the Coca-Cola Bottling Works, inasmuch as the purchase was made from an intermediate dealer.

Before considering this proposition, there are some minor matters of which we should dispose.

It is first urged on behalf of the bottling works that there was a fatal variance between the declaration and the proof, in that the declaration charged defendants below with negligently placing the cigar stub in the bottle, while the proof tended to

show that the cigar stub was placed in the bottle by some one else and was in the bottle when it was filled. The charge of the declaration is that the cigar stub "was placed in such bottle and sealed up with said fluid by defendant company, its agents and employees, and had been negligently placed upon the market for sale and for use as aforesaid." The real negligence charged in this declaration is the sealing up of the cigar stub in the bottle and the placing of such bottle on the market. It is immaterial as to who put the stub in the bottle, and a variance between the declaration and the proof in an immaterial matter does not affect the case.

It is next said that the plaintiffs below were guilty of contributory negligence in not examining more closely the bottle and its contents. We think there is nothing in this. The proof shows that the bottle and the fluid were both of a dark color, and the cigar stub could not be readily discerned. Furthermore, it is to be presumed that the contents of sealed packages put on the market to be used as a food or beverage are fit to be so used. A consumer is not negligent in failing to examine the same for poisonous substances.

There are some other matters mentioned in the brief filed for the bottling works which we do not think it necessary to discuss, and we come to the main question in the case.

The trial judge doubtless based his action on the case of *Burkett v. Manufacturing Co.* (126 Tenn., 467; 150 S. W., 421), and this case is pressed upon the court by counsel for defendant company as being conclusive of this controversy.

Burkett v. Manufacturing Co., supra, was a case in which the purchaser of a carriage, which had been bought from a dealer, sued the manufacturer for injuries sustained by reason of the spokes in one of the wheels breaking. It was held by this court that the manufacturer was not liable to the purchaser. The court said:

The general rule is that a manufacturer is not liable to a third person, who buys his goods from an intermediate dealer, because of the want of any privity between the parties. The rule is different, however, if the manufacturer had knowledge of the defect, and put the article upon the market in that condition. In such case he is guilty of fraud, and is liable to anyone into whose hands the article falls, and who is injured while using it properly. He is also liable to such third person where the article sold is of such kind as to be imminently dangerous to human life or health; also, when an article, although not apparently dangerous, is known by him to be such, and he gives no notice of its qualities when he puts it upon the market. (*Burkett v. Manufacturing Co.*, 126 Tenn., 472; 150 S. W., 421.)

We do not think the foregoing case sustains the action of the court below. The present case falls within the second exception stated in *Burkett v. Manufacturing Co.* All medicines, foods, and beverages are articles of such kind as to be imminently dangerous to human life or health unless care is exercised in their preparation.

Upon a person who undertakes the performance of an act which, if not done with care and skill, will imperil the lives of others, the law imposes the duty of exercising the requisite care and skill. In such matters such a person is liable to others suffering from his negligence.

This liability does not depend on contract or privity, but arises from a breach of the legal duty, to which we have just referred. A tort is committed, a legal right invaded, by practices which prejudice another's health.

Speaking in a case similar to this one, the New Jersey Court of Errors and Appeals said:

Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including "the preservation of a man's health from such practices as may prejudice or annoy it." (First Blackstone's Comm., 129, 134.) * * * To assert, therefore, that one living in a state of society organized, as ours is, according to the principles of the common law, need not be careful that his acts do not endanger the life or impair the health of his neighbor, seems to offend against the fundamentals. (*Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.)

Upon the principles stated, a negligent manufacturer has been held liable for injuries to consumers, purchasing from intermediate dealers, for the careless labeling

of poisons and patent medicines. (*Thomas v. Winchester*, 6 N. Y., 397, 57 Am. Dec., 455; *Blood Balm Co. v. Cooper*, 83 Ga., 457, 10 S. E., 118, 5 L. R. A., 612, 20 Am. St. Rep., 324.) For negligently bottling beer with broken glass in the bottle. (*Watson v. Augusta Brewing Co.*, 124 Ga., 121, 52 S. E., 152, 1 L. R. A. (N. S.), 1178, 110 Am. St. Rep., 157.) For negligent preparation of mincemeat put up in a package. (*Salman v. Libby*, 219 Ill., 421, 76 N. E., 573.) For the careless and negligent canning of spoiled meat. (*Tomlinson v. Armour & Co.*, 75 N. J. L., 748, 70 Atl., 314, 19 L. R. A. (N. S.), 923.) See also *Bishop v. Weber* (139 Mass., 411, 1 N. E., 154, 52 Am. Rep., 715).

So when the manufacturer of this beverage undertook to place it on the market in sealed bottles, intending it to be purchased and taken into the human stomach, under such circumstances that neither the dealer nor the consumer had opportunity for knowledge of its contents, he likewise assumed the duty of exercising care to see that there was nothing unwholesome or injurious contained in said bottles. For a negligent breach of this duty the manufacturer became liable to the person damaged thereby.

Practically all the modern cases are to the effect that the ultimate consumer of foods, medicines, or beverages may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles. This is certainly true where the articles are sold in sealed packages and are not subject to inspection. Some of the cases place the liability on the grounds heretofore stated. Others place it on pure-food statutes. Others say there is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use, and another case says that the liability rests upon the demands of social justice. See the cases collected in a note to *Mazetti v. Armour & Co.* (48 L. R. A. (N. S.), 213, 219) and in a note to *Tomlinson v. Armour & Co.* (19 L. R. A. (N. S.), 923).

Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, the result is eminently satisfactory, conducive to the public welfare and one which we approve.

The judgment of the Court of Civil Appeals is affirmed.

NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT.

Druggists—Registration—New York Law Held to be Reasonable and Valid.

PEOPLE v. ROEMER, 153 N. Y. Supp., 323. (May 7, 1915.)

The New York law requiring places where drugs are retailed to be registered annually is a moderate and lawful exercise of the police power, and is valid.

The fact that storekeepers who are not pharmacists are permitted to sell certain drugs in small villages and country places distant from a drug store, while licensed pharmacists are required to register annually, is not such discrimination as to render the law unreasonable and void.

PER CURIAM: The plaintiffs have recovered a penalty of \$50 for a violation by defendant of the public health law relating to the practice of pharmacy. Chapter 422, Laws 1910, section 234 of the act, provides that every place in which drugs are retailed "shall be annually registered in the month of January by the board as conducted in full compliance with law and the rules." The statute provides for a registration fee of \$2. The defendant did not pay the fee; hence he did not receive his certificate; hence he did not display the certificate. Therefore he violated the law. He makes three complaints: (1) That he is a licensed druggist, and that the statute impairs his right to pursue his occupation; (2) that the exaction of the fee is oppressive and arbitrary; (3) that storekeepers, not druggists, may under conditions do what he (a skilled druggist) may not do under other conditions.

So far as it concerns the present question, a licensed druggist is not denied the right to follow his occupation, but the State exacts that the place where he carries